Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1999

CARL BERK,

Petitioner,

-against-

THE STATE OF NEW YORK and DANIEL A. SENKOWSKI,
Superintendent, Clinton Correctional Facility,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CORCUIT

PETITION FOR A WRIT OF CERTIORARI

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38 pp

QUESTIONS PRESENTED

1. Was petitioner entitled to a Certificate of Appealability pursuant to 28 U.S.C. §2253(c)(2) to raise the issue of whether the failure of where the district court to appoint counsel in a habeas corpus proceeding violated his sixth amendment rights.

2. May the state preclude a criminal defendant from exercising his sixth and fourteenth amendment compulsory process rights to present general psychological evidence (not based on an examination of defendant) when his failure to comply with the state's notice requirement was made in good faith and not for the purpose of a tactical advantage?

PARTIES TO THE PROCEEDING

The parties to the proceeding are those named in the caption.

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CITATION TO OPINION BELOW

The Order of the Court of Appeals is not reported but appears in the Appendix hereto. (App. C) The opinion of the District Court appears in the Appendix hereto (App. B). The recommendation and report of the Magistrate appears in the Appendix hereto (App. A).

STATEMENT OF JURISDICTION

The order of the Court of Appeals was entered on January 25, 2000. The jurisdiction of the Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment VI:

In all Criminal positions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

United States Constitution, Amendment XIV, Section 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

New York Criminal Procedure Law 250.10:

1. As used in this section, the term "psychiatric evidence" means:

(a) Evidence of mental disease or defect to be offered by the defendant in connection with the affirmative defense of lack of criminal responsibility by reason of mental disease or defect.

(b) Evidence of mental disease or defect to be offered by the defendant in connection with the affirmative defense of extreme emotional disturbance as defined in paragraph (a) of subdivision one of section 125.25 of the penal law and paragraph (a) of subdivision two of section 125.27 of the penal law.

(c) Evidence of mental disease or defect to be offered by the defendant in connection with any other defense not specified in the preceding paragraphs.

2. Psychiatric evidence is not admissible upon a trial

unless the defendant serves upon the people and files with the court a written notice of his intention to present psychiatric evidence. Such notice must be served and filed before trial and not more than thirty days after entry of the plea of not guilty to the indictment. In the interest of justice and for good cause shown, however, the court may permit such service and filing to made at any later time prior to the close of the evidence.

New York Penal Law §125.25:

A person is guilty of murder in second degree when:

(1) With intent to cause the death of another person, he causes the death of such person or of a third person; except that in any prosecution under this subdivision, it is an affirmative defense that:

(a) The defendant acted under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse, the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believed them to be....

STATEMENT OF THE CASE

Upon discovering his wife, Virginia Berk in bed with Joseph Valvo, a police officer, petitioner, fatally shot both of them. He was convicted of manslaughter in the first degree in connection with the death of Valvo and murder in the second degree in connection with the death of his wife. Valvo was shot in the bedroom and Virginia Berk was shot in the kitchen, while calling the police. He was sentenced to a minimum of eight and one-third years to twenty-five years imprisonment for the

manslaughter conviction and twenty-one years to life imprisonment for the murder conviction. The sentences to run consecutively.

At trial, petitioner proffered the affirmative defense of extreme emotional disturbance,[1] but did not seek to submit and evidence arising out of a psychiatric of psychological exam. He was never examined by any psychiatric experts for the purposes of his trial. Rather, proof of petitioner's affirmative defense rested in large part on his own testimony of his marriage, relationship with his wife, devastation at her suing for divorce, depression over his bankrupt business, hopes for reconciliation with his wife, and loss of control upon his discovery of his wife in the martial bed with Joseph Valve.

Petitioner remembered entering the bedroom, fearful of attack by the much more physically powerfully Joseph Valve and being immediately jumped upon by the police officer; he was conscious of the struggle and his flight from the bedroom, down the stairs to the kitchen en route to the garage exit, his customary means out of the house. Although petitioner testified that he remembered seeing a naked Virginia Berk on the kitchen telephone, he had no recollection of either speaking with her or shooting her.

The People, on the other hand, sought to have the jury infer that petitioner deliberately chose to enter the kitchen, not as a means of egress to the garage exit, but rather purposely, to find Virginia Berk and shoot her. As a defense to the People's claim that petitioner intentionally killed his wife and in support of his affirmative defense extreme emotional disturbance,

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[1] See New York Penal Law §§125.25(1)(a) and 125.27(2)(c) (This affirmative defense can reduce the crime of intentional murder in the second degree to manslaughter in the first degree.)

petitioner needed to adduce the testimony if Dr. Charles Ewing, a lawyer and well-known local forensic psychologist (T.883-884).[2]

The defense desired to question Dr. Ewing about the manner in which people behave stressful and traumatic situations, e.g., the flight or fight response that petitioner would have been experiencing after his attack by Joseph Valve and which would have explained why he chose to exit the house using his familiar route through the kitchen (T.884). In addition, the defense also wanted to elicit Dr. Ewing's expert testimony concerning circumstances under which those involved in very stressful situations can have memory loss of the catastrophic event, thus accounting for petitioner's in ability to recall shooting Virginia Berk (T.885). Significantly, however, Dr. Ewing had not examined the petitioner and would not therefore be questioned about any findings particular to the petitioner's personality or mental state. Dr. Ewing's testimony was to be strictly limited to general psychological concepts and reactions common to the larger population.

No notice requirement pursuant to CPL §250.10[3] had

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[2] Refers to the trial transcript. As Magistrate Judge Scott stated in his report and recommendation, "The majority of the operative facts are not disputed."

[3] N.Y. CPL §250.10 provides, in part, that "[p]sychiatric evidence is not admissible upon a trial unless the petitioner serves upon the people and files with the court a written notice of his intention to present psychiatric evidence. Such notice must be served and filed before trial and not more that thirty days after entry of the plea of not guilty to the indictment. In the interest of justice and for good cause shown, however, the court may permit such service and filing to be made at any later time prior to the close of the evidence."

been filed by defense counsel, which maintained that Dr. Ewing's testimony was admissible absent notice primarily because this situation was not one in which the subject of the proffered testimony was the witness' psychiatric/psychological examination to the petitioner(T.886). Instead, Dr. Ewing was to testify about emotional reactions that would be normal under the circumstances in which petitioner was situated on October 24, 1992 (T.886-887).

The People objected on several grounds, claiming first that they would have no time to confer with their own expert before cross-examining the defense witness, and second, that Dr. Ewing's opinion testimony would invade the province of the jury (T.888-889). The trial court concluded that "the testimony falls under the notice requirement under CPL §250.10, and I don't find any good cause shown, and I think it would be unfair at this point to, at the last days of this trial, to allow Professor Ewing to testify, given no showing of any reason why you haven's noticed the People ahead of time" (T.891).

A. *Decision of the New York State Court of Appeals*

The New York State Court of Appeals affirmed Carl Berk's judgment of conviction. *People v. Berk*, 88 N.Y. 2d 257, 644 N.Y.S. 2d 658, *cert. denied* _U.S._, 117 S.Ct. 160 (1996). In its opinion, the Court of Appeals first noted that the proffered expert testimony by Dr. Ewing regarding trauma syndrome known as "fight or flight" and impairment of memory following traumatic events, in connection with an extreme emotional disturbance defense to charges of murder and manslaughter, was "psychiatric evidence" subject to statutory notice requirements and was thus inadmissible where petitioner failed to serve written notice within 30 days of plea of not guilty to indictment. McKinney's CPL §250.10. *Id.* at 265.

In addition, the Court of Appeals also rejected petitioner's argument that the trial court abused its discretion in refusing to accept late notice and violated his constitutional right to present a defense:

The decision whether to allow a defendant, "[i]n the interest of justice and for good cause shown," to serve and file late notice [88 N.Y.2d 266] of intent to introduce psychiatric evidence is a discretionary determination to be made by the trial court (CPL 250.10[2]; see, *People v. DiDonato,* 87 N.Y.2d 992, 642 N.Y.S.2d 616, 665 N.E.2d 186). The trial court's discretion in this as a sanction for a defendant's failure to comply with a statutory notice requirement implicates a defendant's constitutional right to present witnesses in his own defense (see, U.S. Const. 6th, 14th Amends; see also *Ronson v. Commissioner of Corrections,* 604 F.2d 176, 178, supra). In making its determination, the trial court must therefore weigh this right against the resultant prejudice to the People from the belated notice.

Certainly, the fact that Dr. Ewing never examined defendant minimized the prejudice to the People here, since they were not deprived of an opportunity to conduct their own pretrial examination shortly after the offense. The People were nonetheless entitled to obtain their own expert to assess and possibly refute Dr. Ewing's conclusions regarding loss of memory or "fight or flight" trauma. Defendant, moreover, failed to offer any explanation other than indecision for waiting until near the end of trial to notify the court and prosecutor of Dr. Ewing's testimony. (667 N.E.2d 313) Under these circumstances, the trial court did not abuse its discretion in precluding the expert psychiatric testimony. *Id.* at 265-66.

B. *New York State Post-Conviction Applications*

Following denial of *certiorari,* petitioner acting *pro se,* moved pursuant to Section 440.10 of the New York Criminal Procedure Law, to vacate his convictions on the grounds of both ineffective assistance of trial counsel for failure to give the timely notice for the psychologist's testimony, and ineffective assistance of appellate counsel for failure to raise this issue on direct appeal. These motions were denied respectively, by the trial court and affirmed by the Appellate Division, Fourth Department on September 25, 1997 and September 30, 1997.

C. *The Habeas Corpus Petition Pursuant to 28 U.S.C §2254*

1. *Introduction*

On April 18, 1997, petitioner *pro se,* filed a petition for a writ of habeas corpus in the United States District Court, Western District of New York. He raised three issues[4] (1) that the trial court's failure to permit the testimony from the psychologist Dr. Charles Ewing denied him his Sixth Amendment right to present a defense, (2) that the conviction was obtained in violation of the Fourteenth Amendment in that the instruction given to the jury were improper as to whether he had a duty to retreat, and (3) that his conviction for murder in the second degree was based upon insufficient evidence.

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[4] Notably absent were the issues of ineffective assistance of trial and appellate counsel

2. *The Denial of the request for Appointment of Counsel*

At the same time, petitioner filed his petition, he also moved for appointment of counsel and to *proceed in forma pauperis*. As part of his motion for appointment of counsel, petitioner stated as follows:

> I believe that I am not able to do an adequate job of representing myself in the above-entitled proceeding because I am a layman-at-law, the legal issues are complicated, and I do not know how to adequately support my petition on the law. The within Memorandum of Law was prepared by a paralegal in the prison's Law Library.

On April 14, 1997, the district court denied petitioner's request for appointment of counsel.

Thereafter on June 5, 1997, petitioner again moved for appointment of counsel. At this time, petitioner stated as follows:

> Contrary to respondent's allegation of lack of merit, the issues raised in my habeas corpus are meritorious constitutional points of law.
>
> As a layman-at-law, it would be in appropriate to penalize me for raising any unexhausted issues. Accordingly, I am in "DIRE NEED" of an attorney to represent me in this matter. Please find enclosed my motion and affirmation in Support for appointment of counsel.
>
> Thank you for your full cooperation.

On June 23, 1997, Magistrate Judge Hugh B. Scott denied petitioner's motion stating it was his responsibility to retain an attorney or proceed *pro se.*

D. ***The Report and Recommendation of Magistrate Judge Hugh B. Scott***

The Magistrate Judge recommended that the petition be denied. As to the issue of the denial to the request to present the testimony of the forensic psychologist, he noted that the failure to file the §250.10 notice constituted a procedural default which precluded federal habeas corpus relief.

E. ***The Order of the District Court***

On May 25, 1998, the District Court, upon *de novo* review of the Magistrate Judge's report and recommendation adopted, the findings and denied the petition for habeas corpus relief. He also denied a certificate of appealability by finding that petitioner failed to make a substantial showing of the denial of a constitutional right.

F. ***The Denial of a Certificate of Appealability***

On January 25, 2000, the Court of Appeals for the second Circuit denied petitioner's motion for a Certificate of Appealability.

REASONS FOR GRANTING THE WRIT

I. The questions presented raise significant issues concerning the right to *counsel and* the right to compulsory process to call witnesses.

Petitioner claims that he has made a substantial showing of a denial of constitutional rights in two ways (1) under the circumstances of this case, the failure of the district court to appoint counsel in his habeas corpus proceeding denied him his due process right under the Fifth and Sixth Amendments, and (2) the refusal of the trial court to exercise discretion to allow petitioner to call Dr. Ewing and to present an extreme emotional disturbance defense was a violation of petitioner's Sixth Amendment Rights.

1. ***Failure to Appoint Counsel and the Prejudice to Petitioner***

We recognize there is no constitutional right to counsel in a federal habeas corpus proceeding. *Romero v. Senkowski,* 950 F.Supp. 573 (S.D.N.Y. 1996), citing *Washington v. Delo,* 51 F.3d 756 (8th Cir.), *cert. denied,* _U.S._ 116 S.Ct. 205 (1995). A district court, however, may appoint counsel for a habeas petition when the interests of justice so require. See 18 U.S.C. §3006 (a)(2) and Rules of the United States District Court for the Western District of New York, Criminal Justice Act Plan, Appendix G, IV (B) (2).

In the instant case, the district court abused its discretion and denied petitioner his due process rights in not appointing counsel for him. First, by his motion to proceed *in forma pauperis*, petitioner demonstrated his indigency. Second, by motions for appointment of counsel, petitioner demonstrated a need for counsel and that his issues were complex and substantial. Indeed, the most significant issues that should been presented were the ineffective assistance of trial and appellate counsel regarding the filing by trial counsel of late notice of psychiatric evidence in connection with the defense of extreme emotional disturbance and the failure of appellate counsel to

raise this issue of appeal. While petitioner raised these claims in post-conviction application, he inexplicably failed to present them in his habeas corpus petition. Had counsel been appointed in the habeas corpus proceeding, those issues would have raised and very possibly been successful. Failure to appoint counsel under these circumstances, i.e., indigency substantial issues, and the request for assistance, where procedures exist both by statute and the rules of the district court for appointment of counsel, violates due process.

Here, trial counsel acknowledged that he never filed notice pursuant to CPL §250.10 even though the plain language on the purpose of the section provided for the filing of notice. Due to his ineffective assistance in making a timely notice to the People as mandated by CPL §250.10, the petitioner was thus foreclosed from adducing crucial proof on two very important questions: (1) why did petitioner head toward the kitchen (where his wife was on the telephone with the police) instead of leaving through the front door after the altercation with Joseph Valvo in the master bedroom?, and (2) why could petitioner not remember speaking to and shooting his wife: Petitioner was the only source of defense testimony and under these circumstances the failure to make the CPL §250.10 motion, severely prejudice him. There exists more than a reasonable probability that, but for defense counsel's failure to make the §250.10 motion, the result of the trial would have been significantly different. Dr. Ewing's testimony could have provided mitigating evidence that petitioner's fleeing the house through the kitchen –his normal exit- was a response to the extreme stress of the attack by Joseph Valvo, rather than a calculated act to harm his wife. Moreover, had the jury been allowed to hear Dr. Ewing's expert opinion that memory lapses are a common experience of those who have suffered severe emotional trauma , the jury could very well have determined that petitioner's shooting of his wife was indeed the result of extreme emotional disturbance.The

ineffective assistance of defense counsel in his failure to make a timely §250.10 motion effectively destroyed petitioner's ability to convince the jury that he had suffered an extreme emotional disturbance, thereby abridging petitioner's right to a fair trial and due process of law in blatant violation of the Sixth and Fourteenth Amendments to the Constitution; the failure to raise this issue on direct appeal was also ineffective. Indeed, these issues which were raised and exhausted on state collateral attack should have been raised in the federal habeas proceedings.

2. The Refusal of the Trial Court to Exercise Discretion to Allow Berk to Call Dr. Ewing and to Present an Extreme Emotional Disturbance Defense Was a Violation of Berk's Sixth Amendment Rights.

The Sixth Amendment to the Constitution guarantees to a criminal defense the right of compulsory process to call witnesses in his favor. This right is applicable to the states under the Fourteenth Amendment and is implicated when a defendant is barred from calling witnesses to testify on his behalf. *Washington v. Texas,* 388 U.S. 14, 19, 22, (1967); *Singleton v. Lefkowitz,* 538 F.2d 618, 623 (2d Cir. 1978), *cert.denied,* 440 U.S. 929; In *Ronson v. Commissioner of Correction of State of New York,* 604 F.2d 176, 178, 79 (2d Cir. 1979), this Court was presented with the same New York Notice Statute (CPL §250.10) as here, and found that the state court's failure to exercise its discretion to allow that petitioner to call a psychiatrist to testify in support of a complete insanity defense, constituted a violation of the petitioner's Sixth Amendment rights. In that case, defense counsel while never filing a formal notice of intention to raise such a defense, did attempt prior to trial, to comply with the statute. In upholding the petitioner's

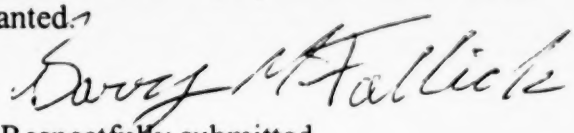
claim, this court also stated that a continuance would have served to minimize any prejudice to the state resulting from the lack of formal notice (*Id.* At 178-79).

Like the situation in *Ronson v. Commissioner of Corrections,* any prejudice here to the state did not justify the total exclusion of the extreme emotional disturbance defense. Any need for the state to obtain its own expert to assess Dr. Ewing's conclusions regarding memory on "flight" trauma could have been dealt with through the granting of a continuance. See *Ronson v. Commissioner of Corrections,* at 179.

Since there was no question at trial that petitioner committed the murders, a claim of extreme emotional disturbance was crucial to his defense in the shooting of Valvo. A successful defense would have reduced the murder conviction to manslaughter in the first degree and a sentence of eight and one-third to twenty years' imprisonment on this count. See, *infra* at pp. 12-13. The decision to preclude totally the defense of EED violated petitioner's Sixth Amendment rights. *Ronson v. Commissioner of Corrections,* at 179.

CONCLUSION

For the reasons set forth above, a petition for a writ of certiorari should be granted.



Respectfully submitted,

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

CARL BERK,

Petitioner,

-against-

DANIEL A. SENKOWSKI, Superintendent,

Respondent.

Hon. Hugh B. Scott
97CV0255A
Report & Recommendation

The petitioner, Carl Berk, has filed an application to this Court for habeas corpus relief pursuant to 28 U.S.C. §2254 challenging his state court conviction.

Background

After a jury trial, the petitioner was convicted on one count of murder in the second degree, and one count of manslaughter in the first degree in connection with the deaths of his estranged wife, Virginia Berk, and her lover, Joseph Valvo.

The majority of the operative facts are not disputed. A few weeks before the incident, Virginia Berk advised the petitioner that she intended to get a divorce and asked him to move out of their home at 107 Sable Park Court, Amherst, New York. He moved out as requested. (T 776) Although he was no longer staying at the Sable Park home, some of his clothes and many of his belongings remained there. The petitioner retained

a key and let himself in and out sporadically. (T. 556-57) Apparently because he suspected that his wife was having an affair, the petitioner connected a wiretap device to his wife's telephone which allowed him to monitor all incoming and outgoing calls. (T. 663-64)

On October 22, 1992, Berk listened to the recording of an October 21, 1992 call between his wife and Valvo which confirmed that she and Valvo were having an affair. (T.675) Later on that same day, the petitioner went to the Sable Park home and found Valvo sitting in the living room. Berk became upset and asked Valvo to leave. (T. 693) According to Berk, Valvo responded saying something to the effect that "if you try to throw me out, you might wind up with some broken legs." (T. 694) On the evening of October 23, 1992, the petitioner returned to the Sable Park home.[5] He heard his wife and Valvo making love in the master bedroom. Berk retrieved a gun from a built-in bureau in another bedroom, loaded the gun, and entered the master bedroom. (T.719) Virginia fell off the bed to one side, and Valvo got up and walked toward Berk, Berk claims that he fired the gun in self defense as he and the younger, bigger Valvo struggled. (T.723) As this was happening, Virginia ran down to the kitchen and called 911. Valvo sustained a fatal gun shot to the stomach. The recording of the 911 call reveals that as Virginia was on he phone with the

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[1] The parties did dispute the time at which Berk arrived at 107 Sable Park on October 23, 1992. The petitioner contends that he arrived after his wife and Valvo were already home. The prosecution asserted that the memory chip of the burglar alarm at 108 Sable Park indicated that the alarm was deactivated (and reactivated) earlier in the evening at a time when Virginia Berk and Valvo were placed at a restaurant having dinner (T. 66-69, 404) The prosecution contended that this revealed that Berk was already in the house, laying in wait, when his wife and Valvo came home from dinner.

911 dispatcher, Berk entered the room and shot her twice notwithstanding her pleas that he spare her. (T. 94-99, 725) Shortly after, the petitioner turned himself in to the police.

Discussion

The petitioner raises three grounds for relief: (1) that the conviction was obtained in violation of his Sixth Amendment rights in that he was precluded from presenting testimony of a forensic psychologist; (2) that the conviction was obtained in violation of the Fourteenth Amendment in that the instructions given to the jury were improper as to whether he had a duty to retreat; and (3) that his conviction for murder in the second degree was based upon insufficient evidence.

Exhaustion

In the interest of comity and in keeping with the requirements of 28 U.S.C. §2254(b), federal courts will not consider a constitutional challenge that has not first been "fairly presented" to the state courts. See *Ayala v. Speckard,* 89 F.3d 91 (2d Cir. 1996) citing *Picard v. Connor,* 404 U.S. 270, 275, 92 S.Ct. 509, 512, 30 L.Ed.2d. 438 (1971); *Daye v. Attorney General of New York,* 696 F.2d 186, 191 (2d Cir. 1982)(*en banc*), *cert. denied,* 464 U.S. 1048 (1984). A state prisoner seeking federal habeas corpus review of his conviction must first exhaust his available state court remedies with respect to the issues raised in the federal habeas petition. *Rose v. Lundy,* 455 U.S. 509 (1982). To meet this requirement, the petitioner must have raised the question in a state court challenge to his conviction and put the state appellate court on notice that a *federal constitutional claim* was at issue. See *Grady v. LeFevre,* 846 F.2d 862, 864 (2d Cir. 1988); *Petrucelli v. Coombe,* 735

F.2d 684, 688-89 (2d Cir. 1984).

Notwithstanding a failure to exhaust state court remedies, §2254(b)(2) provides the Court with discretion to *deny* (but not to grant) an application for a writ of habeas corpus on the merits.

Each of the three claims presented in the instant petition were asserted in the petitioner's state court appeal. The respondent argues, however, that the question of whether the petitioner has a duty to retreat was not presented to the state courts as a *constitutional* issue. Based upon the circumstances presented in this case the Court believes that it is appropriate to address the merits of the petition.

Denial of Request to Present Forensic Psychologist

On the final day of an eleven-day trial, the petitioner's trial counsel announced that the defense wished to call a psychologist, Dr. Charles Ewing, to testify as to the manner in which people behave in stressful situations. Dr. Ewing was not previously mentioned as a possible defense witness. Dr. Ewing had never examined Berk. The defense had not filed a notice pursuant to New York State Criminal Procedure Law §250.10 which requires pre-trial notice to be filed if a defendant intends to introduce "psychiatric evidence."[6] The petitioner's counsel argued that notice was not required because Dr. Ewing's

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[6] N.Y. CPL §250.10 provides, in part, that "[p]sychiatric evidence is not admissible upon a trial unless the defendant serves upon the people and files with the court a written notice of his intention to present psychiatric evidence. Such notice must be served and filed before trial and not more than thirty days after entry of the plea of not guilty to the indictment. In the interest of justice and for good cause shown, however, the court may permit such service and filing to be made at any later time prior to the close of the evidence."

testimony was not to be offered as to Berk's specific state of mind, but instead it was to be offered as to "general psychological concepts." (Memorandum of Law attached to the Petition, at page 13.) The trial court refused to allow Dr. Ewing to testify. Both the Appellate Division, Fourth Department (629 N.Y.S. 2d 588 (4th Dept. 1988)) and the New York State Court of Appeals (88 N.Y.2d 257 (1996)) agreed that Dr. Ewing's testimony was properly precluded as falling within the scope of CPL §250.10 requiring pre-trial notice.

The petitioner does not directly challenge the constitutionality of the notice provisions of CPL §250.10, but only the application of that statute in this case. The state court's determination that the provisions of CPL §250.10 were applicable with respect to Dr. Ewing's proposed testimony was not contrary to, nor did it involve an unreasonable application of, "clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. §2254 (e)(1). Moreover, the petitioner's failure to file the §250.10 notice constituted a procedural default which precludes federal habeas corpus relief. *Jones v. Vacco,* 126 F.3d 408, 414 (2ndCir. 1997) (A petitioner who procedurally defaults on his state court remedies is barred from obtaining federal habeas relief.) Citing *Ellman v. Davis,* 42 F.3d 144, 147 (2d Cir. 1994); *Harris v. Reed,* 489 U.S. 255, 262 (1989).

Jury Instruction Regarding Duty to Retreat

Berk assert that he was "justified" in shooting Valvo because he feared that Valvo "would be aggressive and had the capacity to use deadly physical force." (Petitioner's Memorandum of Law attached to the Petition, at page 27.) The petitioner claims that the state trial court erred by instructing the jury that Berk may have had a "duty to retreat" in connection

with his "justification defense."

Pursuant to New York law, under certain circumstances the use of deadly physical force upon another person is lawful, or justified, where the defendant reasonably believed such force necessary to defend against what he or she reasonably believed to be the use or imminent use of deadly physical force by the other person (Penal Law §35.15). This defense is unavailable to a defendant who "knows that he can with complete safety as to himself and others avoid the necessity of [using deadly physical force] by retreating" (Penal Law §35.15(2)(a)). A defendant who is "*in his dwelling and not the initial aggressor,*" however, has no such duty to retreat. (Penal Law §35.15(2)(a)(i)(emphasis added)).

In the instant case, the Court of Appeals held that "[i]n order for defendant to be relieved of the duty to retreat, however, the Sable Park Court home must have been *his* dwelling (Penal Law §35.15(2)(a)(i)." *Berk*, 88 N.Y.2d at 267. The Court of Appeals noted that this constituted a disputed factual question to be decided by the jury. The Court held that "there were substantial evidence at trial both supporting and opposing a conclusion that the Sable Park Court home was defendant's dwelling on the date of the shootings. Consequently, it was not error for the court to deny defendant's request to instruct the jury that he had no duty to retreat because the residence was his dwelling." *Berk*, 88 N.Y.2d at 267.

The petitioner argues that the Sable Park residence was his dwelling as a matter of law, and that the issue should not have been put to the jury as a factual question. Although Berk cites numerous factual items which, he argues, evidence that the Sable Park residence was his dwelling (that he had a key, that his clothes were there...), he fails to site to any authority which establishes that this presented a question of law for the Court as

opposed to a question of fact to be decided by a jury. Indeed, the decision by the Court of Appeals established that, in New York State, this is a question of fact to be presented to a jury. Once again, this determination by the Court of Appeals was not contrary to, nor did it involve an unreasonable application of, "clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. §2254(e)(1). Thus, the petitioner's due process rights were not violated by the inclusion of this instruction to the jury.

The Sufficiency of the Evidence

At trial, the petitioner asserted extreme emotional disturbance[7] as an affirmative defense in response to the charge that he intentionally murdered his wife. The petitioner argues that every element of murder in the second degree was not proven beyond a reasonable doubt and that the preponderance of the evidence supports the affirmative defense of extreme emotional disturbance.

In considering the petitioner's challenge to the sufficiency of the evidence supporting his murder conviction, and the rejection of his affirmative defense, the Court must

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[3] New York Penal Law §125.25 provides:

> A person is guilty of murder in the second degree when:
> '1. With intent to cause the death of another person, he causes the death of such person or of a third person; except that in any prosecution under this subdivision, *it is an affirmative defense that: (a) The defendant acted under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse, the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believed them to be.*

review the evidence "in the light most favorable to the Government." *United States v. Amato,* 15 F.3d 230, 235 (2d Cir. 1994). All inferences from the evidence and issues of credibility must be resolved in favor of the verdict. *United States v. Aulicino,* 44 F.3d 1102, 1114 (2d Cir. 1995); *Amato,* 15 F.3d at 235. In this regard, the petitioner bears "a heavy burden." *United States v. Matthews,* 20 F.3d 538, 548 (2d Cir. 1994).

The Supreme Court has cautioned the federal courts that, under this standard, the jury retains almost the entire range of its traditional discretion as sole judge of the facts. It is the jury, as the trier of fact, that has the responsibility to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. The Court may *impinge* upon jury discretion only to the extent necessary to guarantee the fundamental protection of due process of law. *Jackson v. Virginia,* 443 U.S. 307, 319 (1979) (emphasis in original) (footnotes omitted). Therefore, this court is not free to make credibility judgments about the testimony presented at petitioner's trial or to weigh conflicting testimony. *Untied States v. Zabare,* 871 F.2d 282, 286 (2d Cir. 1989)(on appellate challenge to sufficiency of evidence, "the reviewing court must draw all reasonable inferences and resolve all issues of credibility in favor of the verdict"); *Gruttola v. Hammock,* 639 F.2d 922, 928 (2d Cir. 1981) (rejecting insufficient evidence claim because jury was entitled to believe State's witnesses despite inconsistencies in their testimony and State's evidence); *Soto v. Lefevre,* 651 F.Supp. 588, 592 (S.D.N.Y. 1986) (federal habeas court has no power to redetermine comparative credibility of conflicting eyewitness testimony); *Milton v. Riley,* 1988 WL 140663 (E.D.N.Y. 1988) (federal habeas court must adhere to credibility findings of state jury).

The assertion of affirmative defenses such as extreme emotional disturbance are not without risks. As the court in *Navarro v. Abrams,* 1991 WL 7399 (S.D.N.Y. 1990), noted in an analogous context:

> Once a defendant attempts to establish affirmatively that he deserves the benefit of this mitigating defense [extreme emotional disturbance], a lay jury may interpret such a claim as an admission of the act presupposed in such a defense: intentional murder. A similar practical problem occurs every time a defendant raises inconsistent defenses: the law permits them but invariably juries find them suspect.

Navarro 1991 WL 7399, *9 citing *People v. Harris,* 491 N.Y.S.2d 678 (2d Dept 1985), *lv. denied*, 66 N.Y.2d 919, 498 N.Y.S. 2d 1034 (1985).

In the instant case, the jury drawing reasonable inferences from the evidence may fairly and logically have concluded that the affirmative defense of extreme emotional disturbance was not established by the preponderance of the evidence. Viewing the record in the light most favorable to the prosecution, the jury could have concluded that Berk acted in a premeditated, calculating manner by hiding in the house waiting for his wife and Valvo to come home (T. 66-69, 404). Even if the jury accepted the petitioner's contention that he arrived after his wife and Valvo returned home, the jury could have determined that Berk retained his sufficient self-control by the fact that he was purposely trying to be quiet as he came through the house and upstairs to get his gun so they would not hear him (T, 849-50). The jury was free to assess the credibility and give whatever weight they deemed appropriate to these

facts.

Based on the above, a rational fact-finder could reasonably have found the killing of the petitioner's wife to have been intentional, unexcused by circumstances sufficient to mitigate culpability from murder in the second degree to manslaughter in the first degree.

Conclusion

Based on the above, the respondent's motion to dismiss (Docket No. 6) should be GRANTED and the petition for habeas corpus relief should be DISMISSED in its entirety. Pursuant to 28 USC §636(b)(1), it is hereby ordered that this Report & Recommendation be filed with the Clerk of the Court and that the Clerk shall send a copy to the Report & Recommendation to all parties.

ANY OBJECTIONS to this Report and Recommendation must be filed with the Clerk of this Court withing ten (10) days after receipt of a copy of this Report & Recommendation in accordance with 28 USC §636(b)(1), Fed. R. Civ. P. 72(b) and WDNY Local Rule 72(a)(3).

FAILURE TO FILE OBJECTIONS TO THIS REPORT & RECOMMENDATION WITHIN THE SPECIFIED TIME OR TO REQUEST AN EXTENSION OF SUCH TIME WAIVES THE RIGHT TO APPEAL ANY SUBSEQUENT DISTRICT COURT'S ORDER ADOPTING THE RECOMMENDATIONS CONTAINED HEREIN. *Thomas v. Arn*, 474 U.S. 140, 106 S.Ct. 466, 88 L.Ed2d 435 (1985); *F.D.I.C. v. Hillcrest Associates*, 66 F.3d. 566 (2d. Cir. 1995); *Wesolak v. Canadair Ltd.*, 838 F.2d 55 (2d Cir. 1988).

The District Court on *de novo* review will ordinarily refuse to consider arguments, case law and/or evidentiary material which could have been, but was not, presented to the Magistrate Judge in the first instance. See *Patterson-Leitch Co. Inc. v. Massachusetts Municipal Wholesale Electric Co.*, 840 F.2d 985 (1st Cir. 1988).

Finally, the parties are reminded that, pursuant to WDNY Local Rule 72(a)(3), "written objections shall specifically identify the portions of the proposed findings and recommendations to which objection is made and the basis for

such objection and shall be supported by legal authority." FAILURE TO COMPLY WITH THE PROVISIONS OF RULE 72(a)(3) MAY RESULT IN THE DISTRICT COURT'S REFUSAL TO CONSIDER THE OBJECTION.

So ordered.

S/_____
Hon. Hugh B. Scott
United States Magistrate Judge

Dated: Buffalo, New York
March 19, 1998

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

CARL BERK,

Petitioner,

-against-

DANIEL A. SENKOWSKI, Superintendent,

Respondent.

ORDER
97-CV0255A

This case was referred to Magistrate Judge Hugh B. Scott pursuant to 28 U.S.C. § 636(b)(1), on May 9, 1997. On April 8, 1997,petitioner filed a petition for habeas corpus relief. On May 7, 1997, respondent filed a motion to dismiss. On March 19, 1998, Magistrate Judge Scott filed a Report and Recommendation, recommending that petitioner's petition for habeas corpus relief should be dismissed in its entirety and that respondent's motion to dismiss should be granted.

Petitioner filed objections to the Report and Recommendation on April 1 amended objections on April 3, and additional objections on April 30, 1998. Respondent filed a response on May 12, 1998.

Pursuant to 28 U.S.C. §636(b)(1), this Court must make a *de novo* determination of those portions of the Report and Recommendation to which objection have been made. Upon a *de novo* review of the Report and Recommendation, and after reviewing the submissions from the parties, the Court adopts the proposed findings of the Report and Recommendation.

Accordingly, for the reasons set forth in Magistrate Judge Scott's Report and Recommendation, petitioner's petition for habeas corpus relief is denied, and respondent's motion to dismiss is granted.

Petitioner has failed to make a substantial showing of the denial of a constitutional right and is therefore denied a certificate of appealablity.

IT IS SO ORDERED.

HONORABLE RICHARD J. ARCARA
UNITED STATES DISTRICT JUDGE

Dated: May 25, 1998

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 25th day of January, two thousand.

Present:

Hon. Chester J. Straub,
Hon. Ellsworth Van Graafeiland,
Hon. Rosemary S. Pooler,
Circuit Judges.

Carl Berk,

Petitioner-Appellant,

-against-

98-2596

Daniel A. Senkowski, Superintendent,
Clinton Correctional Facility,

Respondent-Appellee.

Appellant has filed, through counsel, for a certificate of appealability. Upon due consideration, it is ORDERED that the motion is denied and the appeal is dismissed. The Appellant has not made a "substantial showing of the denial of a constitutional right." 28 U.S.C. §2253(c).

FOR THE COURT:
Karen Greve Milton, Acting Clerk
By: s/_____